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Nos. 07-984 and 07-990

In The

Supreme Court of the United States

COEUR ALASKA, INC.,

Petitioner,

v.

SOUTHEAST ALASKA CONSERVATION COUNCIL, *et al.,*

Respondents.

ALASKA,

Petitioner,

v.

SOUTHEAST ALASKA CONSERVATION COUNCIL, *et al.,*

Respondents.

On Writs of Certiorari to the United States
Court of Appeals for the Ninth Circuit

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF HOME BUILDERS SUPPORTING PETITIONERS

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Sunding & Zilberman, *The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process*, 42 Nat. Resources J. 59 (2002) 18

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INTEREST OF *AMICUS CURIAE*

The National Association of Home Builders ("NAHB") has received the parties' written consent to file this *amicus curiae* brief supporting Petitioners.[1] NAHB represents over 235,000 builder and associate members throughout the United States, including individuals and firms that construct and supply single-family homes, as well as apartment, condominium, multi-family, commercial and industrial builders, land developers and remodelers. As part of the construction and development process, its members commonly obtain Clean Water Act (CWA) permits under both sections 402 and 404. NAHB has thus developed comprehensive familiarity with the CWA's permitting regimes and provides compliance advice to its members.

NAHB frequently participates as a party litigant and *amicus curiae* to safeguard the rights and interests of its members. NAHB was a petitioner in a CWA case, *NAHB v. Defenders of Wildlife,* 127 S.Ct. 2518 (2007). Attached at Appendix A to this brief is a list of cases in which NAHB has participated before this Court as an *amicus curiae* or "of counsel," in a number of matters involving landowners aggrieved by over-zealous regulation under a wide array of statutes and regulatory programs.

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[1] Letters of consent are on file with the Clerk. Pursuant to Rule 37.6 of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

The nature of the pollutant determines whether a particular discharge requires a CWA section 402 or section 404 permit. Section 404 strictly applies to dredged or fill material, while section 402 reaches "any" other pollutant. When dirt and sediment are involved, it is within the expertise of the Environmental Protection Agency (EPA) and the Army Corps of Engineers (Corps) to decide which permit program applies. When sediment is "placed" at a "specified disposal site" within a jurisdictional "navigable water," section 404 controls. But when sediment moves downstream with water velocity and remains suspended in or "settles" to the bottom of an aquatic body, it is an industrial discharge subject to section 402. Here, the court of appeals stepped outside its narrow role and decided that Coeur Alaska's discharge was from an industrial source that triggered section 402 requirements. It should have deferred to the Corps's determination that the discharge at issue was more appropriately fill material, within section 404.

Furthermore, the requirements that attach to each permit program are mutually exclusive. Congress did not intend that the requisites to obtain a section 402 permit be imposed on a 404 permit, and vice versa. For example, the terms and conditions of a section 402 permit for an industrial discharge must incorporate any applicable "effluent limitation guideline" (ELG). However, neither the Act nor implementing regulations provide a basis to conclude that issuance of a section 404 permit depends on satisfaction of an ELG. It was therefore wrong for the

court of appeals to vacate a section 404 permit because Coeur Alaska did not satisfy an effluent guideline for froth-flotation processes.

While ELGs are not a component of the Corps's program, by no means should the Court believe that the section 404 permit process is somehow deficient in protecting water quality. Quite the opposite. NAHB hopes that the following description of the applicable standards, procedures and methods inherent in the dredged or fill permit process will assist the Court in understanding just how difficult, time-consuming and expensive it is for private land owners to obtain section 404 approval—precisely due to the safeguards established by the Corps and EPA to preserve the integrity of aquatic ecosystems.

ARGUMENT

I. THE SPECIFIC TYPE OF POLLUTANT DETERMINES WHICH CLEAN WATER ACT PERMIT PROGRAM COVERS A GIVEN DISCHARGE.

A. Section 404 Permits Cover Dredged or Fill Material, While Section 402 Permits Cover "Other" Pollutants.

Section 301(a) makes it illegal to discharge any pollutant[2] except in compliance with various CWA provisions. 33 U.S.C. § 1311(a). One provision that

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[2] "Discharge of a pollutant" means "(A) any addition of any pollutant to navigable waters from any point source …." 33 U.S.C. § 1362(12)(A).

renders an otherwise illegal discharge permissible is section 402, which establishes the National Pollutant Discharge Elimination System ("NPDES") program.[3] Section 402(a)(1) states:

> *Except as provided* in sections 1328 and 1344 of this title, the [EPA] Administrator may, after opportunity for public hearing, issue a permit for *the discharge of any pollutant, or combination of pollutants*, notwithstanding section 1311(a) of this title ….

33 U.S.C. § 1342(a)(1) (emphasis supplied). Section 402(a)(1)'s application to discharges of "any pollutant, or combination of pollutants," is limited by its opening clause: "Except as provided in sections 1328 and 1344 of this title …." *Id.* The first exception carved-out from section 402 is section 318, which authorizes EPA "to permit the discharge of a specific pollutant or pollutants under controlled conditions associated with an approved aquaculture project under Federal or State supervision …." *Id.* § 1328(a). Relevant to this case, the second exception from section 402 is section 404, which states:

> The Secretary may issue permits, after notice and opportunity for public hearings for the

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[3] "The [EPA] initially administers the NPDES permitting program for each State, but a State may apply for a transfer of permitting authority to state officials." *Nat'l Ass'n of Home Builders v. Defenders of Wildlife,* 127 S. Ct. 2518, 2525, 2531-32 (2007) (holding that EPA lacks discretion and must transfer NPDES permit issuing authority to a state that satisfies criteria set forth at section 402(b), 33 U.S.C. § 1342(b)).

> discharge of *dredged or fill material* into the navigable waters at specified disposal sites.

Id. § 1344(a) (emphasis supplied).

The CWA's text and structure are clear that the applicable permit program depends on the type of pollutant discharge at issue. Section 402 is a catch-all, generically covering discharges of "any" pollutant. If a pollutant precisely regulated by section 318 or 404 is discharged, then the more exact text applies instead of section 402. Specific statutory provisions govern over general ones. See, *e.g., Edmond v. United States*, 520 U.S. 651, 657 (1997); *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992). "However inclusive may be the general language of a statute, it will not be held to apply to a matter specifically dealt with in another part of the same enactment." *Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222, 228 (1957) (internal quotes omitted).

Accordingly, section 318—not section 402—covers "specific pollutants under controlled conditions associated with an approved aquaculture project." 33 U.S.C. § 1328. And section 404—not section 402—covers discharges of "dredged or fill material." *Id.* § 1344(a). EPA's regulations (entirely ignored by the court of appeals) implement this statutory construct:

> The following discharges do not require NPDES permits:
> . . . .

> (b) Discharges of dredged or fill material into waters of the United States which are regulated under section 404 of [the] CWA.

40 C.F.R. § 122.3(b).

B. Section 404 Permits Cover Sediment "Placed" at Specified Disposal Sites, While Section 402 Permits Cover Sediment Transported by Flowing Water.

Usually, it is relatively simple to determine whether a discharge is composed of dredged or fill material, as opposed to some other pollutant. "[T]raditional pollutant[s]"—that is, mobile, soluble, and typically non-solid substances that "readily wash downstream"—are subject to the NPDES program. Cf. *Rapanos v. United States,* 547 U.S. 715, 724 (2006) (plurality). However, the CWA defines "pollutant"[4] to "cover[ ] both" solids and non-solids, and includes "toxic materials such as sewage, chemical waste, biological material, and radioactive material and the discharge of dredged spoil, rock, sand, cellar dirt, and the like." *Id.* at 774 (Kennedy, J., concurring in the judgment). See also *id.* at 807 (Stevens, J., dissenting) (regulation of "alluvium" and "silt" which "make[ ] [their] way downstream" require a CWA permit).

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[4] "The term 'pollutant' means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." 33 U.S.C. § 1362(6).

To ascertain what CWA program applied to Coeur Alaska's discharge, the court of appeals almost exclusively focused on that bit of the agencies' regulation defining "fill material" as that which "has the effect of … changing the bottom elevation" of a jurisdictional waterbody. 33 C.F.R. § 323.1(e)(ii). This regulatory definition does not provide a complete answer to the question of which permit program properly manages sediment discharges. Indeed, all grains of dirt and alluvium can fall to the bed of an aquatic feature and alter its elevation. Correctly, the agencies have never implemented the Act in such a manner to always treat sediment as fill.

NAHB submits that the language in section 404 itself, and a separate regulatory definition of the phrase "*discharge of* fill material," provide substantial assistance in determining which permit program covers sediment in any given situation. Whether section 402 or 404 governs depends on the difference between the *placement* of dirt at specified disposal sites, as opposed to the *settling* of solids suspended in water. The CWA states that section 404 should apply to discharges of material "into the navigable waters ***at*** specified disposal sites." 33 U.S.C. § 1344(a) (emphasis supplied). A specified disposal site is thus a more exact location within a waterbody subject to the Act's jurisdiction. Furthermore, section 404 permits must identify that precise locus where fill is discharged: "[E]ach such disposal site shall be specified for each such permit …." *Id.* § 1344(b). Congress also gave EPA authority "to prohibit the specification of any *defined area* as a disposal site …." *Id.* § 1344(c).

The agencies' current regulatory definition of "discharge of fill material" is consonant with Congress's conception of dirt discharged at specific, defined sites within jurisdictional waters:

> The term "discharge of fill material" … generally includes, without limitation, the following activities: *Placement* of fill that is necessary for the construction of any structure or infrastructure in a water of the United States; … *placement* of fill material for construction or maintenance of any liner, berm, or other infrastructure associated with solid waste landfills; *placement* of overburden, slurry, or tailings or similar mining-related materials ….

33 C.F.R. § 323.2(f) (emphasis supplied). The ordinary meaning of "placement" is "an act or instance of placing"; the verb "place" means "to put in a particular place … to direct to a desired spot." Webster's New Collegiate Dictionary, at 876 (1975).[5] Accordingly, when dirt or sediment is "placed" in a particular spot (to use Congress's term, "at specified disposal sites"), then a discharge of fill material has occurred. In such instances, section 404 applies and the discharger who places fill must obtain a Corps permit.

In contrast, Congress did not require NPDES permits to specify disposal sites. Section 402 is designed to regulate sediment discharges that are *not*

[5] See also The Concise Oxford Dictionary of Current English, at 925 (5th ed. 1964) ("place" means "Put (thing, etc.) in particular place; arrange (set of things) in their proper places").

placed in or directed to any defined site within a statutory "navigable water." In other words, dirt that flows with water and remains suspended[6] in or "settles"[7] atop the bed of a jurisdictional feature is appropriately within NPDES purview. The agencies themselves have drawn this distinction:

> Recognizing that some discharges *(such as suspended or settleable solids)* can have the associated effect, over time, of raising the bottom elevation of a water due to the settling of waterborne pollutants, *we do not consider such pollutants to be "fill material"* ….

Final Revisions to the Clean Water Act Regulatory Definitions of "Fill Material" and "Discharge of Fill Material," 67 Fed. Reg. 31,129, 31,135 (May 9, 2002) (Fill Rule) (emphasis supplied).

C. Courts Must Defer to the Agencies' Expertise in Deciding Whether a Particular Discharge is Fill Material or Some "Other" Pollutant, and Accordingly Which Permit Program Should Apply.

The salient point is that EPA relies on section 402 to regulate solid material like sediment moved by

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[6] The CWA provides that "suspended solids," such as sediment, is a "conventional pollutant." 33 U.S.C. § 1314(a)(4).

[7] "Settle" is defined as "to seat, bring to rest, come to rest …to clarify by causing dregs or impurities to sink …." Webster's New Collegiate Dictionary, at 1061 (1975). See also The Concise Oxford Dictionary of Current English, at 1162 (5th ed. 1964) ("settle" means "cease from wandering or motion or change or disturbance or turbidity (often *down*)" (italics original).

hydro-velocity, which remains suspended in a waterbody or sinks to its bottom. On the other hand, the Corps implements section 404 to regulate sediment "placed" at a "specified disposal site." Whether a discharge of sediment is more likely to move downstream with flowing water, or placed in a particular spot, "is a classic example of a factual dispute the resolution of which implicates substantial agency expertise." *Marsh v. Or. Natural Resources Council,* 490 U.S. 360, 376 (1989) (upholding Corps decision as not "arbitrary and capricious" under the Administrative Procedure Act). See also *Balt. Gas & Elec. Co. v. Natural Res. Def. Council,* 462 U.S. 87, 103 (1983) ("When examining this kind of scientific determination ... a reviewing court must generally be at its most deferential"); *Kleppe v. Sierra Club,* 427 U.S. 390, 412 (1976) (where analysis "requires a high level of technical expertise," court must defer to "the informed discretion of the responsible federal agencies").

This case boils down to agency deference. The Corps decided that Coeur Alaska's discharge was "fill" not only due to the fact that it raised the bottom elevation of Lower Slate Lake, but further because "1,440 tons of tailings … in the form of a slurry" would be *placed* in the lake "each day." *S.E. Alaska Conservation Council v. U.S. Army Corps of Eng'rs,* 486 F.3d 638, 642 (9th Cir. 2007). The agency was best positioned to decide that Coeur Alaska needed a section 404 permit; the court of appeals improperly afforded that determination no deference whatsoever, by concluding that the company committed a "discharge of pollutants from industrial or municipal

sources," to trigger section 402 permit requirements. *Id.* at 646.[8]

More critically, there was no statutory or regulatory basis for the court of appeals to conclude that the *Corps* could use a section 404 permit as a vehicle to enforce *EPA's* effluent limitation guideline for froth-flotation mills. As the agencies have stated in rulemaking, their "existing approach" is to regulate pollutants:

> under *either* section 402 *or* 404 of the CWA. Effluent limitation guidelines and new source performance standards ("effluent guidelines") promulgated under section 304 and 306 of the CWA establish limitations and standards for specified wastestreams from industrial categories, and those limitations and standards *are incorporated into permits issued under section 402 of the Act. EPA has never sought to regulate fill material under effluent guidelines*.

Fill Rule, 67 Fed. Reg. at 31,135 (emphasis supplied).

Thus, the Corps should have received deference for its decision that Coeur Alaska's discharge was fill material "placed" at a specified disposal site. This is especially so, because EPA did not otherwise conclude that Coeur Alaska's discharge was more

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[8] Through section 402(p), 33 U.S.C. § 1342(p), Congress has created a program for municipal and industrial discharges of sediment suspended in stormwater under the NPDES program. *Infra* at 14-16. Notably, it did not create the program under the auspices of section 404.

appropriately subject to section 402. EPA is accustomed to addressing suspended or settleable sediment,[9] which is significantly different in nature than dirt "placed" at a defined disposal site. In other situations, EPA has surely exercised its expertise and authority to determine that a discharge from a mining site is "any" other pollutant constituting suspended or settleable solids. In those cases an NPDES permit would be needed, which must incorporate relevant effluent limitation guidelines such as the froth flotation limitation at issue in this

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[9] See EPA, Volunteer Estuary Monitoring: A Methods Manual, Second Edition, EPA-842-B-06-003 (2d ed. March 2006), at 15-3, *available at* http://www.epa.gov/owow/estuaries/monitor/ (last visited Sept. 3, 2008) ("Suspended materials such as sand, soil, or silt tend to *settle out* faster in brackish water than in fresh water. These particles *settle to* the estuary bottom, where they smother fish eggs and bottom-dwelling animals, and alter the habitat needed by estuary plants and animals"); EPA, Office of Water, Volunteer Stream Monitoring: A Methods Manual, EPA 841-B-97003 (Nov. 1997), § 5.8, *available at* http://www.epa.gov/owow/monitoring/volunteer/stream/ (last visited on Sept. 3, 2008) ("Total solids are dissolved solids plus *suspended and settleable* solids in water …. *Suspended solids* include silt and clay particles, plankton, algae, fine organic debris, and other particulate matter. These are particles that will not pass through a 2-micron filter"); EPA, Office of Water, Volunteer Lake Monitoring: A Methods Manual, EPA 440-4-91-002, § 2.E at 17, *available at* http://www.epa.gov/volunteer/lake/lakevolman.pdf (last visited on Sept. 3, 2008) ("Not all sediment particles quickly *settle* to the lake bottom. The lighter, siltier particles often *stay suspended* in the water column or *settle so* lightly on the bottom that they can be easily stirred up and resuspended even with slight water motion …. Sediment blocks light from penetrating the water column. It also interferes with the gills of fish ….") (emphasis supplied to all).

case. Indeed, the Federal Register preamble to that very effluent guideline provides:

> The … limitations … in this regulation will be applied to individual gold placer mines *through NPDES permits issued by EPA or approved state agencies, under section 402 of the Act.* These requirements do not apply to individual discharges until incorporated into NPDES permits. As discussed in the preceding section of this preamble, these limitations must be applied in all Federal and States NPDES permits except to the extent that variances and modifications are expressly authorized.

Ore Mining and Dressing; Point Source Category; Effluent Limitations Guidelines, Pretreatment Standards, and New Source Performance Standards, 53 Fed. Reg. 18,764, 18,787 (May 24, 1988) (emphasis supplied).

Moreover, a *single* discharge of water containing sediment cannot simultaneously be subject to *two* permit programs. That result would improperly "conflate" the CWA's "two separate permitting mechanisms … governing different discharges, subject to different protective requirements …." Br. for the Federal Resp'ts in Opp'n to Cert. Pet. at 6-7, *Coeur Alaska, Inc. v. S.E. Alaska Conservation Council,* No. 07-984 (consol. with No. 07-990) (S. Ct. filed May 14, 2008). Regulatory havoc would certainly ensue if both EPA (or a state to which

NPDES authority has been transferred) *and* the Corps each must permit the very same discharge.[10]

In sum, one of the most fundamental decisions that the Corps and EPA must make is whether an activity discharges either placed "fill material" or "any" other pollutants such as settleable sediment. How could that decision possibly be the prerogative of federal judges? The court of appeals should be reversed for not deferring to the Corps's determination that section 404 controlled the mining activity in this case.

D. EPA's Comprehensive Section 402 Program for Stormwater Runoff is Designed to Control Sediment That Moves With Flowing Water (as Opposed to Fill Placed in a Specific Location).

By way of example, EPA's regulatory practice in using section 402 to control sediment suspended in liquid is best evidenced through its complex, two-phase program covering stormwater runoff. The NPDES program was initially enacted in 1972 and proved successful in imposing "pollution control

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[10] This is not to say that two discharges of different pollutants, at a single facility, might not require separate permits under each program. For example, NAHB members must obtain NPDES permit coverage for discharges of sediment in stormwater from construction sites at least one acre in size. *Infra* at 16. In addition, if construction activity at that same site requires a discharge of fill material into jurisdictional wetlands, the home builder must also obtain a section 404 permit. But the agencies have never required the home builder in this scenario to obtain four permits—that is, section 402 *and* 404 permits for the stormwater discharge, and both again for the wetlands fill.

measures for industrial process wastewater and municipal sewage …." National Pollutant Discharge Elimination System—Regulations for Revision of the Water Pollution Control Program Addressing Storm Water Discharges, 64 Fed. Reg. 68,722, 68,723 (Dec. 8, 1999) (Phase II Rule). Congress later thought more was needed to protect water quality, and directed EPA to study and control "storm water runoff draining large surface areas …." *Id.* Thus, "[i]n 1987, to better regulate pollution conveyed by stormwater runoff, Congress enacted [CWA] § 402(p), 33 U.S.C. § 1342(p)." *Envtl. Def. Ctr. v. EPA,* 344 F.3d 832, 841 (9th Cir. 2003), *cert. denied,* 541 U.S. 1085 (2004) (*Environmental Defense*).

Starting in 1990 and under the authority of section 402(p), EPA developed an entirely new (and by now massive) regulatory program to control sediment transported by stormwater. First, EPA required NPDES permits for stormwater discharges from "large" municipalities generally serving populations of 100,000 persons or more, as well as several industrial categories including construction activities at sites disturbing five or more acres of land. See NPDES Permit Application Regulations for Storm Water Discharges, 55 Fed. Reg. 47,990 (Nov. 16, 1990) (Phase I Rule). Nine years later, EPA followed with the Phase II Rule, expanding NPDES stormwater requirements to smaller municipalities in urbanized areas, as well as construction sites that disturb one and up to five acres of land. Phase II Rule, 64 Fed. Reg. at 68,723.[11]

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[11] The legislative and regulatory history of the federal stormwater regime is discussed in *Environmental Defense,* 344

Suffice it to say that EPA governs a realm of ever-expanding permit requirements for discharges of silt and dirt moved by water, but not placed anywhere in particular. *It has done this under the rubric of section 402.* Thousands of pages of EPA regulations and "guidance" exist to address sediments transported by stormwater. From NAHB's perspective, the NPDES stormwater program affects virtually *all* residential development projects in the United States, as it applies to every construction site one acre or larger. EPA's stormwater regulations even apply to a house built on a single lot, if it is part of a subdivision that exceeds the one-acre threshold.[12]

To conclude, the Corps and EPA are best suited to determine whether the nature of a sediment discharge is more appropriately regulated under section 402 or section 404. The court of appeals should have accepted the Corps's decision that Coeur Alaska's discharge was the placement of fill material covered by section 404—to which section 402 permit conditions promulgated by EPA had no application. The court of appeals should thus be reversed.

F.3d at 841-844, and *Tex. Indep. Prods. & Royalty Owners Ass'n v. EPA,* 410 F.3d 964, 967-68 (7th Cir. 2005).

[12] See 40 C.F.R. § 122.26(b)(15)(i) ("small construction activity" requiring an NPDES permit "includes the disturbance of less than one acre of total land area that is part of a large common plan of development or sale if the large common plan will ultimately disturb equal to or greater than one…acre[]").

II. THE STRINGENT REQUIREMENTS OF THE SECTION 404 PERMIT PROGRAM ADEQUATELY PROTECT WATER QUALITY.

It is irrational to apply EPA's effluent limitation guidelines to fill material. By their very nature, ELGs are designed to regulate the pollutant concentrations in *effluent*—an aqueous substance—and not in fill material—a solid substance. Rather, the safeguards built into the section 404 process; the complicated regulations that have multiplied thereunder; and the arcane (if not downright bizarre) manner in which the program has been implemented by the agencies and interpreted by the courts, demonstrate that the regulators place paramount emphasis on water quality and environmental protection as they administer dredged or fill permits.

While Congress vested the Corps with the responsibility to issue section 404 permits (33 U.S.C. § 1344(a)(1)), EPA retains a major oversight role. It was given authority to develop "guidelines" (actually rules) governing the discharge of dredged or fill material. *Id.* § 1344(b)(1). The so-called "404(b)(1) guidelines" establish the core permitting standards that the Corps and applicants must follow. *See* 45 Fed. Reg. 85,636 (Dec. 24, 1980) (discussed *infra* at 19-23). Among other things, these guidelines regulate the types of materials that can be used for fill purposes in order to protect water quality. See generally 40 C.F.R. pt. 230, subpts. G, H. EPA can also veto Corps permits if the proposed discharge "will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery

areas (including spawning and breeding areas), wildlife or recreational areas." 33 U.S.C. § 1344(c). Finally, EPA has independent enforcement authority under section 404. *Id.* § 1319.

Before discussing the extensive permit procedures and standards which the agencies and applicants must follow to receive a Corps permit, another introductory point warrants emphasis: The section 404 process is long and expensive. "The average applicant for an individual [404] permit spends 788 days and $271,596 in completing the process, and the average applicant for a nationwide permit spends 313 days and $28,915—not counting costs of mitigation or design changes .... 'Over $1.7 billion is spent each year by the private and public sectors obtaining wetlands permits.'" *Rapanos*, 126 S.Ct. at 2214 (plurality) (citing Sunding & Zilberman, *The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process,* 42 Nat. Resources J. 59, 74-76, 81 (2002)). Individual[13] section 404 permits are subject to numerous requirements which conceptually fall

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[13] Aside from project-specific individual permits issued on a case-by-case basis, the Corps can also issue general permits. These are accomplished on a state, regional or nationwide basis, for "any category of activity," where the discharge of dredged or fill material "will cause only minimal adverse environmental effects" both separately and cumulatively. 33 U.S.C. §1344(e)(1). Coeur Alaska's discharge was *not* processed under a general permit, so NAHB will only discuss the standards and procedures for individual permits. It should be noted, however, that no discharge that otherwise qualifies for a nationwide permit is allowed unless conditions to protect water quality are satisfied. Reissuance of Nationwide Permits; Final Notice, 72 Fed. Reg. 11,092, 11,194 (March 12, 2007) (General Condition 21).

into two broad categories: (1) those imposed by the CWA itself, and agency regulations and policies specifically designed to protect water resources; and (2) those arising from the Corps's obligation to comply with other laws.

A. Requirements Imposed by the Clean Water Act and Agency Regulations.

Before the Corps issues a section 404 individual permit, it must follow four primary requirements which derive from the CWA and agency regulations: (1) the discharge must comply with EPA's 404(b)(1) guidelines; (2) the discharge must be considered under the Corps's "public interest review" criteria; (3) the impact on jurisdictional waters must be mitigated to offset the loss of aquatic functions and values; and (4) all Corps permits must be certified under section 401 by the state in which the discharge occurs, as complying with water quality standards. Each element is discussed in turn below.

1. 404(b)(1) Guidelines.

The CWA provides that Corps permits must satisfy "guidelines" developed by EPA. 33 U.S.C. § 1344(b). EPA's 404(b)(1) guidelines contain a number of restrictions to ensure that the discharge of dredged or fill material does not adversely affect water quality.

For example, the guidelines' subpart G provides standards and procedures for evaluating and testing the material for contaminants. Among other things, these provisions require that "the extraction site shall be examined … to assess whether it is sufficiently

removed from sources of pollution to provide reasonable assurance that the proposed discharge material is not a carrier of contaminants ...." 40 C.F.R. § 230.60(b). Testing approaches and procedures are in place to address "potential effects" that the discharge of contaminated dredged or fill material might have "on the water column and on communities of aquatic organisms." *Id.* § 230.61(b). Additionally, subpart H provides myriad techniques to minimize the adverse effects of discharges, such as by the "choice of the disposal site,"[14] the "treatment of, or limitations on the material itself,"[15] and measures to control post-discharge effects.[16] These are only a few of the items contained in subparts G and H to protect water quality as part of the section 404 permitting process.

In addition, the 404(b)(1) guidelines require a careful evaluation of the project site where fill is discharged. They provide that "[n]o discharge of

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[14] 40 C.F.R. § 230.70. For example, adverse effects can be minimized by "[l]ocating and confining the discharge to minimize the smothering of organisms," and "[d]esigning the discharge to avoid a disruption of periodic water inundation patterns." *Id.* § 230.70 (a), (b).

[15] *Id.* § 230.71. For example, adverse effects can be minimized by "[a]dding treatment substances to the discharge material," and "[u]tilizing chemical flocculants to enhance the deposition of suspended particulates ...." *Id.* § 230.71(c), (d).

[16] *Id.* § 230.72. For example, adverse effects after the discharge has occurred can be minimized by "[c]apping in-place contaminated material with clean material," and "[t]iming the discharge to minimize impact, for instance during periods of unusual high water flows, wind, wave, and tidal actions." *Id.* § 230.72(b), (d).

dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have *less adverse impact upon the aquatic ecosystem,* so long as the alternative does not have other significant adverse environmental consequences." 40 C.F.R. § 230.10(a) (emphasis supplied); *Bering Strait Citizens for Responsible Res. Dev. v. U.S. Army Corps of Eng'rs*, 524 F.3d 938, 947 (9th Cir. 2008). These guidelines further explain:

> [A]n alternative is practicable if it is available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes. If it is otherwise a practicable alternative, an area *not presently owned by the applicant* which could reasonably be obtained, utilized, expanded or managed in order to fulfill the basic purpose of the proposed activity may be considered.

40 C.F.R. § 230.10(a)(2) (emphasis supplied). In other words, to arrive at the least environmentally damaging alternative for a project, one of the alternatives that must be assessed before a section 404 permit will issue is an offsite alternative, which looks at other locations to accomplish the project's purpose. Applicants thus evaluate different properties *they do not own,* which would not involve any discharge to jurisdictional waters.

Moreover, the 404(b)(1) guidelines contain a critical presumption against filling "special aquatic

sites," such as wetlands.[17] Corps regulations provide that where the "basic purpose" of a project is not "water dependent" (such as to provide housing) and does not require proximity to or siting within a wetland,

> *practicable alternatives that do not involve special aquatic sites are presumed to be available,* unless clearly demonstrated otherwise. In addition, where a discharge is proposed for a special aquatic site, all practicable alternatives to the proposed discharge which do not involve a discharge into a special aquatic site are presumed to have less adverse impact on the aquatic ecosystem, unless clearly demonstrated otherwise.

Id. § 230.10(a)(3). (emphasis supplied). Thus, when the Corps considers an individual section 404 permit application, it must presume that other less-damaging and more environmentally preferable alternatives exist when the proposed discharge is into a special aquatic site (like wetlands). Guidelines for Specification of Disposal Sites for Dredged or Fill Material; Final Rule, 45 Fed. Reg. 85,336, 85,339 (Dec. 24, 1980). If a project proposes a discharge into wetlands, the number of alternatives and the level of scrutiny applied to each alternative are substantially

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[17] Regulations define "special aquatic sites" as "geographic areas, large or small, possessing special ecological characteristics of productivity, habitat, wildlife protection, or other important and easily disrupted ecological values," including wetlands, sanctuaries, refuges, mud flats, coral reefs, pool complexes, and vegetated shallows. 40 C.F.R. § 230.3(q-1); *id.* pt. 230, subpt. E.

greater. *Utahns for Better Transp. v. U.S. Dep't of Transp.*, 305 F.3d 1152, 1163 (10th Cir. 2002).

In sum, the 404(b)(1) guidelines, including restrictions on the material used as fill, the requirement for assessing alternatives to the proposed discharge, and the presumption against projects that would fill wetlands and other special aquatic sites, provides significant protection of water quality.

2. Public Interest Review.

If the Corps finds that an application complies with the 404(b)(1) guidelines, a permit "will be granted unless the district engineer determines that it would be contrary to the public interest." 33 C.F.R. § 320.4(a); *Bering Strait*, 524 F.3d at 948. The public interest review regulations have a curious history in that they predate the CWA and are not specifically authorized by the Act. While the review itself has not been invalidated by any court, the breadth of that evaluation has been questioned. See generally Want, Law of Wetlands Regulation § 2.6 (2008) (development of public interest review under the Rivers and Harbors Act of 1899); see also *Mall Props. v. Marsh,* 672 F. Supp. 561, 565-566 (D. Mass. 1987).

The public interest review includes "an evaluation of the probable impacts, including cumulative impacts, of the proposed activity and its intended use on the public interest." 33 C.F.R. § 320.4(a)(1). The regulations indicate that a permit will be granted *unless* it is contrary to the public interest, with the huge qualification that the permit must comply with

the 404(b)(1) guidelines. The scope of the review is staggering:

> Evaluation of the probable impact which the proposed activity may have on the public interest requires a careful weighing of *all those factors which become relevant in each particular case.* The benefits which reasonably may be expected to accrue from the proposal must be balanced against its reasonably foreseeable detriments. The decision whether to authorize a proposal, and if so, the conditions under which it will be allowed to occur, are therefore determined by the outcome of this general balancing process. *That decision should reflect the national concern for both protection and utilization of important resources. All factors which may be relevant to the proposal must be considered including the cumulative effects thereof:* among those are conservation, economics, aesthetics, general environmental concerns, wetlands, historic properties, fish and wildlife values, flood hazards, floodplain values, land use, navigation, shore erosion and accretion, recreation, water supply and conservation, water quality, energy needs, safety, food and fiber production, mineral needs, considerations of property ownership *and, in general, the needs and welfare of the people.*

Id.; *Bering Strait*, 524 F.3d at 948-949 (the Corps properly weighed the public interest by considering significant environmental and economic issues relating to the permitted activity).

In short, the Corps's public interest review criteria provide yet another institutional safeguard to ensure protection of water and ecosystem quality in the section 404 process.

3. Mitigation.

"Mitigation" refers to the permit applicant's obligation to offset the adverse environmental consequences of the proposed discharge of dredged or fill material.[18] Agency policy speaks in terms of a permitting "sequence" of avoidance, minimization and compensation. See Memorandum of Agreement Between the Department of the Army and the Environmental Protection Agency, Concerning the Determination of Mitigation Under the Clean Water Act Section 404(b)(1) Guidelines (Feb. 6, 1990). Permit sequencing means that in reviewing an application, the Corps must first ensure that jurisdictional waters are avoided to the maximum extent practicable (generally accomplished through the alternatives analysis requirement). Next, the impact of any allowable discharges must be minimized (such as through the subpart G and H criteria discussed above). Only after aquatic impacts are avoided and then minimized does mitigation come into play. In virtually every permit scenario, the applicant must compensate for the loss of waters occasioned by the discharge. The "avoid, minimize, mitigate" sequencing is codified at 33 C.F.R. §

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[18] In fiscal year 2005, the Corps authorized 20,754 acres of wetland impacts, and required 56,693 acres of compensatory mitigation. *See* Compensatory Mitigation for Losses of Aquatic Resources; Final Rule, 73 Fed. Reg. 19,594, 19,603 (Apr. 10, 2008).

320.4(r)(1), and has been retained in a recent compensatory mitigation rule. *See* Compensatory Mitigation for Losses of Aquatic Resources; Final Rule, 73 Fed. Reg. 19,594, 19,671 (Apr. 10, 2008) (to be codified at 33 C.F.R. § 332.2 (definition of compensatory mitigation)) (Mitigation Rule).

The goal of mitigation is to implement the general national policy of "no net loss" of aquatic functions and values. The new, comprehensive Mitigation Rule locks into regulation the "no net loss" standards that have evolved over time. 73 Fed. Reg. at 19670 (to be codified at 33 C.F.R. pt. 332 and 40 C.F.R. pt. 230, subpt. J.) See also Guidance on Compensatory Mitigation Projects for Aquatic Resource Impacts Under the Corps Regulatory Program Pursuant to Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899, Regulatory Guidance Letter No. 02-2 (Dec. 24, 2002).

Compensatory mitigation is one of the most challenging aspects of a section 404 permit application. Compensating for lost functions and values is generally accomplished through one or a combination of: (a) *restoration* of degraded aquatic areas; (b) *enhancement* of existing aquatic areas (such as raising the functions of an area that is already aquatic but not degraded); (c) *establishment* (also called "creation") of new aquatic areas; and (d) preservation of existing resources. 33 C.F.R. §§ 332.2, 332.3(a)(2).[19] Each of these methods can be executed through three basic approaches: (a) purchase of

[19] There are parallel cites to the Corps' compensatory mitigation regulations in the EPA 404(b)(1) Guidelines at 40 C.F.R. pt. 230, subpt. J.

credits in a mitigation bank (*i.e.,* a facility that has restored or created wetlands or other aquatic areas in advance); (b) payment of an in-lieu fee to an entity that will use the money to restore or create wetlands or other aquatic resources; or (c) development and implementation of a "permittee-responsible" mitigation plan. That plan could be accomplished onsite or offsite (preferably within the same watershed) and could be in-kind (addressing the same kind of aquatic resources impacted, which is preferred) or in some circumstances, out-of-kind (particularly if the resources that are being addressed through the plan are of higher function or value than the resources impacted). See generally *id.* § 332.3.

Historically, the Corps and EPA operated under a number of policies that encouraged permittee-sponsored, on-site, in-kind mitigation projects. Because of the concern over the success of such projects and the tendency to create isolated mitigation parcels surrounded by or adjacent to development activities, the Mitigation Rule creates a new hierarchy of preferences: Mitigation banks are the most preferred, followed by in-lieu fee programs, and then permittee-responsible mitigation. Mitigation Rule, 73 Fed. Reg. at 19,673-74 (to be codified at 33 C.F.R. § 332.3(b)(2)).

Accordingly, mitigation requirements incorporated into virtually every section 404 permit provide further assurances to safeguard, and often improve, water quality.

4. Section 401 Water Quality Certification.

There is more. CWA section 401 requires that before any federal permit can be issued under the Act, the applicant must secure from the state in which the activity occurs a certification that the discharge does not cause or contribute to a violation of state water quality standards. 33 U.S.C. § 1341(a)(1). See *S.D. Warren Co. v. Me. Bd. of Envtl. Prot.,* 547 U.S. 370, 374-375 (2006) (discussing section 401 process, and affirming certifications of Maine agency requiring hydropower company to maintain minimum stream flows for dam operations). The water quality certification is generally secured from the state pollution control agency except in cases where that agency does not have authority to act (such as on Indian reservations), in which case EPA must provide certification. States (or EPA as the case may be) have discretion to impose a broad range of requirements pursuant to section 401 certification, so long as the requirements are related to an effluent limitation or state law requirement designed to protect water quality. *PUD No. 1 of Jefferson County v. Wash. Dep't of Ecology,* 511 U.S. 700 (1994) (upholding minimum stream flow requirement imposed as part of certification of a federal permit for a hydroelectric facility as necessary to comply with state water quality standards).

Accordingly, required section 401 certifications provide further, ample protection of water quality when the Corps issues a section 404 permit.

B. Requirements Imposed by the Corps's Obligation to Comply with Other Laws.

All of the items discussed above, triggered every time the Corps considers an individual section 404 permit application, derive from the CWA and agency regulations designed to protect jurisdictional "navigable waters." Additional obligations borne by the Corps external to the CWA must also be followed, providing yet more layers of protection for the broader aquatic ecosystem. Space limitations allow for only the most cursory itemization of these additional agency obligations, which have spawned their own legions of regulations, guidance, and jurisprudence.

1. National Environmental Policy Act (NEPA).

NEPA requires federal agencies, including the Corps, to consider the environmental impact of their actions. 42 U.S.C. § 4321, *et seq*. Major federal actions significantly affecting the environment require preparation of an Environmental Impact Statement (EIS). As part of the permit review process, the Corps is directed to prepare an environmental assessment (EA) "as soon as practicable after all relevant information is available …." 33 C.F.R. pt. 325 app. B, § 7(a). If the EA concludes that the issuance of the permit will significantly affect the environment, then a full-blown EIS must be prepared. *Id.* §§ 7, 8. If the Corps determines that issuance of the permit will not have a significant environmental impact, it issues a Finding of No Significant Impact (FONSI). 33 C.F.R. § 230.11; *id.* pt. 325 app. B, § 7. The large majority of section 404 permits are processed by an EA rather

than an EIS. But of course, the NEPA process which the Corps must conduct is supplemental to the project-specific alternatives analysis, public interest review, mitigation assessment, and water quality certification that attends to every section 404 individual permit.

2. Endangered Species Act (ESA).

The Corps must also comply with its obligations under the ESA prior to issuing a permit. ESA section 7 requires federal agencies to consult with the U.S. Fish and Wildlife Service (FWS), or the National Marine Fisheries Service (NMFS), to insure that any action authorized by the agency is not likely to jeopardize the continued existence of any endangered or threatened species, or destroy or adversely modify designated critical habitat. 16 U.S.C. § 1536(a)(2). Federal actions may not proceed if they would either jeopardize the existence of a listed species or adversely modify critical habitat. See, *e.g.*, *Tenn. Valley Auth. v. Hill*, 437 U.S. 153 (1978) (enjoining construction of the Tellico Dam because it would have resulted in extinction of the Snail darter).

If the proposed federal action (such as issuance of a Corps permit) "may affect" listed species or critical habitat, the federal agency initiates consultation with FWS or NMFS. 50 C.F.R. § 402.14(a). If a "jeopardy" or "adverse modification" opinion results from the consultation, FWS (or NMFS) will include reasonable and prudent alternatives to the agency's proposed action in order to avoid and minimize harm to endangered wildlife and habitat. 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.14(h)(3). If no such alternative is available and a "jeopardy" opinion is

issued, then the agency may proceed, but it does so at its peril. *Bennett v. Spear*, 520 U.S. 154, 158, 169-70 (1997). Unlike NEPA review which only requires agencies to conduct an analytical process, ESA consultation imposes a substantive limitation on the ability of federal agencies to act.

Thus, when the Corps issues a section 404 permit, it must consider the effects of allowing the discharge on endangered species and designated critical habitat.

3. National Historic Preservation Act (NHPA).

In addition to protecting wildlife resources, the Corps must protect historic resources through NHPA consultation. Section 106 of the NHPA requires any federal agency "undertaking" (like a Corps 404 permit) to "take into account the effect of the undertaking on any district, site, building, structure or object that is included in or eligible for inclusion in the National Register," before approving the project. 16 U.S.C. § 470(f); 36 C.F.R. § 800.2(a). This is done through coordination with the applicable State Historic Preservation Office (SHPO) and with interested Indian tribes. NHPA requirements are notorious sources of delay for processing 404 permits because of the extremely bureaucratic approach to identifying, assessing and addressing potential historic properties (also called "cultural resources" in a more generic sense). The Corps adopted its own set of NHPA regulations in 1990 (33 C.F.R. pt. 325 app. C, 55 Fed. Reg. 27,003 (June 29, 1990)), and has launched an effort to revise them to reflect changes in regulations enacted by the Advisory Council on

Historic Preservation in recent years. 69 Fed. Reg. 57,662 (Sept. 27, 2004) (advance notice of proposed rulemaking for revising Appendix C).

4. Other Laws.

When the Corps issues a section 404 permit that could adversely affect "essential fish habitat," designated in regional fishery management plans throughout the country, it must consult with the NOAA Fisheries Service, a subagency in the Department of Commerce. Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. 1801 *et seq.*; *id.* § 1855(b)(2) (federal agency consultation requirement). NOAA Fisheries can offer "conservation recommendations" as conditions to the section 404 permit which, if not adopted by the Corps, must be explained in writing. See generally 50 C.F.R. § 600.905 (essential fish habitat consultation procedures). Additionally, FWS and state wildlife agencies have authority to comment on section 404 permits pursuant to the Fish and Wildlife Coordination Act, 16 U.S.C. § 661, *et seq.* A number of other laws that could be triggered in the 404 process include Section 307(c) of the Coastal Zone Management Act, 16 U.S.C. § 1456(c); the Marine Mammal Protection Act, 16 U.S.C. § 1361 *et seq.*; and Section 7(a) of the Wild and Scenic Rivers Act, 16 U.S.C. § 1278, *et seq.* A list of such laws typically implicated in the section 404 permitting process is found at 33 C.F.R. § 320.3.

* * *

The standards for obtaining a Corps permit are counterintuitive ("go look at property you do not

own"); technical ("assess the extraction site for contaminants"); amorphous ("practicable," "in the public interest"); and complex ("demonstrate that you can replace lost aquatic functions and values"). Before the Corps can grant a 404 permit it must adhere to multiple related processes whereby another agency has to be consulted (SHPO, FWS), which in some instances can effectively veto the project (EPA under section 404(c), or a state environmental agency under section 401 certification). Moreover, the program has been plagued over the last decade with vexing regulatory issues that seem to have no end or resolution. The most notorious of these are the scope of "navigable waters" jurisdiction after *Rapanos,*[20] and what activities constitute a "discharge of pollutants" triggering CWA permit requirements.[21]

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[20] Since *Rapanos* was handed down, eight petitions for certiorari have sought clarification on the scope of statutory "navigable waters." Two are pending. *United States v. Lucas,* 516 F.3d 316 (5th Cir. 2008), *petition for cert. pending*, No. 07-1512 (filed June 2, 2008); *United States v. Robison*, 505 F.3d 1208 (11th Cir. 2007), *petition for cert. pending sub nom. United States v. McWane,* No. 08-223 (filed. Aug. 21, 2008).

[21] See *S. Fla. Water. Mgmt. Dist. v. Miccosukee Tribe,* 541 U.S. 95, 111-112 (2004) ("discharge of a pollutant" depended on whether waterbodies at issue were "meaningfully distinct," because movement of pollutants in same body is not an "addition" requiring CWA permit; remanding to trial court for further factual findings); *Borden Ranch P'ship v. U.S. Army Corps of Eng'rs,* 537 U.S. 99 (2002) (per curiam) (judgment "affirmed by an equally divided court" as to whether agricultural "discing" activity constituted a regulable "discharge of pollutants"); *Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs,* 145 F.3d 1399, 1404 (D.C. Cir. 1998) (Corps and EPA rule defining "discharge of dredged material" to include "incidental fallback" vacated, because it did not depend on "addition" of

Such lack of clarity on so many levels makes it almost impossible for NAHB to advise its members with any certainty if they need a permit at all, or if they do, how long it will take and how much it will cost, and what their final project will look like when the Corps (and EPA, FWS, SHPO, etc.) are done with it.

That, in a nutshell, is the 404 process. The fact that effluent limitation guidelines are creatures unique to NPDES permits—and are beyond the Corps's authority to incorporate into a dredged or fill permit—by no means diminishes the safeguards in the section 404 program to protect water quality and the aquatic ecosystem. In the case at bench, the court of appeals never considered these elements of the Corps's permit procedures and standards. It was sorely mistaken when it grafted effluent limitation guidelines on to Coeur Alaska's permit, due to baseless concerns that water quality and the aquatic ecosystem were not fully considered and protected as part of the section 404 process.

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material); *Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs,* 2007 WL 259944 at *4 (D.D.C. Jan. 30, 2007) (Corps and EPA rule to redefine "discharge of dredged material" again stuck as illegal, because agency's "regard[ ]" of mechanized landclearing as a discharge did not depend on an "addition" to jurisdictional waters).

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

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Respectfully submitted.

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APPENDIX A

Cases in which NAHB has appeared as an *amicus curiae* or "of counsel" before this Court include:

Agins v. City of Tiburon, 447 U.S. 255 (1980); *San Diego Gas and Elec. Co. v. City of San Diego,* 450 U.S. 621 (1981); *Williamson County Reg'l Planning Comm'n v. Hamilton Bank,* 473 U.S. 172 (1985); *MacDonald, Sommer & Frates v. Yolo County,* 477 U.S. 340 (1986); *First English Evangelical Lutheran Church v. Los Angeles County,* 482 U.S. 304 (1987); *Nollan v. Cal. Coastal Comm'n,* 483 U.S. 825 (1987); *Pennell v. City of San Jose,* 485 U.S. 1 (1988); *Yee v. City of Escondido,* 503 U.S. 519 (1992); *Lucas v. S.C. Coastal Council,* 505 U.S. 1003 (1992); *Dolan v. City of Tigard,* 512 U.S. 374 (1994); *Babbitt v. Sweet Home Chapter of Cmtys. for a Greater Ore.,* 515 U.S. 687 (1995); *Suitum v. Tahoe Reg'l Planning Agency,* 520 U.S. 725 (1997); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.,* 526 U.S. 687 (1999); *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs,* 531 U.S. 159 (2001); *Palazzolo v. Rhode Island,* 533 U.S. 606 (2001); *Franconia Assocs. v. United States,* 536 U.S. 129 (2002); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency,* 535 U.S. 302 (2002); *Borden Ranch P'ship v. U.S. Army Corps of Eng'rs,* 537 U.S. 99 (2002); *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.,* 538 U.S. 188 (2003); *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians,* 541 U.S. 95 (2004); *San Remo Hotel, L.P. v. City and County of San Francisco,* 545 U.S. 323 (2005); *Lingle v. Chevron U.S.A., Inc.,* 544 U.S. 528 (2005); *Kelo v. City of New London,* 545 U.S. 469 (2005); *S.D. Warren Co. v. Me. Bd. of Envtl. Prot.,* 547

U.S. 370 (2006); *Rapanos v. United States,* 547 U.S. 715 (2006); *NAHB v. Defenders of Wildlife,* 127 S.Ct. 2518 (2007); *John R. Sand and Gravel Co. v. United States,* 128 S.Ct. 750 (2008); *Summers v. Earth Island Inst.,* 490 F.3d 687 (9th Cir. 2007), *cert. granted,* 128 S. Ct. 1118 (2008) (No. 07-463); *Entergy Corp. v. Envtl. Prot. Agency*, 475 F.3d 83 (2d Cir. 2007), *cert. granted*, 128 S. Ct. 1867 (2008) (consol. with Nos. 07-589 and 07-597); and *Winter v. Natural Res. Def. Council*, 518 F.3d 658 (9th Cir. 2008), *cert. granted,* 128 S. Ct. 2964 (2008) (No. 07-1239).